D.B. INCOME TAX APPEAL NO.126/2006
(CIT, Jaipur Vs. Narendra Kumar Shah)

Date of order : 18.12.2006

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. K.K. Bissa, for the appellant.

We have heard learned counsel for the appellant. The revenue seeks to raise following substantial questions of law require to be considered in this appeal:

> "(i) Whether on the facts and in the circumstances of the case as well as in the law the learned Tribunal was justified in setting aside the order passed by Assessing Officer under Section 154 of the Act and deleting the surcharge of Rs.5,23,286/- @ 17% of the levied in tis case which was confirmed by the CIT (A), ignoring the settled law that over looking a mandatory provision of law which leaves no option or discretion to the taxing authority e.g. Omission to charge tax, surcharge or interest is a mistake apparent from the record"
>
> (ii) Whether in the facts and circumstances of the case the learned Tribunal was justified in deleting the surcharge levied by the Assessing Officer under Section 154 which was confirmed by the CIT(A)?
>
> (iii) Whether in the facts and circumstances of the case, the learned Tribunal was justified in holding that levy of surcharge while computing tax demand is debatable issue and hence levy of it could not be made subject matter of applicable for rectification under Section 154 of the Income Tax Act, 1961?"

The facts of the case in brief which we shall presently notice are that a search was conducted on the premises of the respondent-assessee on 19.2.2001 and assessment order was made on 23.1.2003 for the block assessment period year 1991-92 to 2000-01 ending as on 31.3.2001. The tax for the income to be computed for the aforesaid block assessment period was levied at the rate prescribed under Section 113. The year relevant to previous year in which the search was conducted, was 2001-02 which ended on 31.3.2002. Section 113 was amended after 31.3.2002 by putting a proviso as under :

> "Provided that the tax chargeable under this section shall be increased by a surcharge, if any, levied by any Central Act and applicable in the assessment year relevant to the previous year in which the search is initiated under section 132 or the requisition is made under section 132A."

The aforesaid amendment came in force w.e.f. 1.6.2002 only.

Relying on the aforesaid proviso, the assessing officer resorted to Section 154 invoking its powers to rectify the assessment order dated 23.1.2003 for the purpose of levying surcharge on the tax computed on the income of the block assessment period. The rectification order dated 21.4.2003 was subjected

to appeal before the CIT (Appeals), who affirmed the order. However, the Tribunal set aside the order of the rectification holding that the question about the levy of surcharge in respect of assessment year ended prior to 1.6.2002 was a debatable issue and therefore such a debatable issue could not be subject to rectification under Section 154.

Apparently, the question whether the proviso which was brought into effect only w.e.f. 1.6.2002 applied to the assessment year which has ended prior to 2002 is a debatable issue and cannot be considered to be an issue on which two interpretation are not possible. The proviso in its retrospective effect confined its applicability on levy of surcharge only in cases where the search was initiated under Section 132 and 132-A in the previous year relating to the assessment year provided in that assessment year the surcharge was leviable, over and above the tax prescribed under the Finance Act in respect of regular assessment. The question does arise whether the proviso which was made effective from 1.6.2002 at all affects the assessments made in respect of assessment year 2001-02 ending prior to 1.6.2002 the date with effect from which only the proviso became applicable for the purpose of invoking provisions of proviso to Section 113.

That being the position, the applicability of

proviso to Section 113 is clearly debatable question and such exercise cannot be taken in rectification which is well settled by Supreme Court. Reference may be made to decisionof Supreme Court in case of T.S. Balaram, Income-Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers and Ors., reported in 1971 (Vol.82) ITR 50.

In view thereof, we do not find any merit in this appeal. The same is dismissed.

(GOPAL KRISHAN VYAS), J. (RAJESH BALIA), J.

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